

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Federal-State Joint Board on Universal Service)	
)	CC Docket No. 96-45
TracFone Wireless, Inc.)	
)	
Petitions for Designation as an)	
Eligible Telecommunications)	
Carrier in the State of Connecticut and)	
the Commonwealth of Massachusetts)	

REPLY COMMENTS OF TRACFONE WIRELESS, INC.

TracFone Wireless, Inc. ("TracFone"), by its attorneys, hereby submits its reply to the comments which were filed on or about December 15, 2004 in response to TracFone's Petition for Designation as an Eligible Telecommunications Carrier in the State of Connecticut and TracFone's Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Massachusetts ("ETC Petitions").¹

INTRODUCTION

On June 8, 2004, TracFone, a Commercial Mobile Radio Service ("CMRS") provider which provides its services exclusively on a prepaid basis, filed a Petition for Designation as an Eligible Telecommunications Carrier in the State of New York and a Petition for Forbearance requesting that the Commission exercise its authority under Section 10 of the Communications Act (47 U.S.C. § 160) to forbear from applying or enforcing the requirement contained at Section 214(e)(1)(A) of the Act (47 U.S.C. § 214(e)(1)(A)) that carriers designated as eligible telecommunications carriers ("ETCs") provide service either using their own facilities or a combination of their own facilities and resale of another

¹ Comments in opposition to TracFone's Connecticut and Massachusetts ETC petitions were filed by Fred Williamson and Associates, Inc. ("FW&A"), United States Telecom Association ("USTA") and Verizon.

carrier's services. On June 21, 2004, TracFone filed ETC petitions for Florida and Virginia.² TracFone's ETC petitions for Florida, New York, and Virginia, as initially filed, requested ETC designations without identifying the specific federal Universal Service Fund ("USF") support which TracFone sought. However, on August 16, 2004, TracFone amended its pending ETC petitions for Florida, New York, and Virginia to advise the Commission that if it was designated as an ETC it would only seek support from the USF's low income program to provide Lifeline service.

On September 20, 2004, TracFone also filed comments in response to a request by the Wireline Competition Bureau for comment on various filings concerning ETC designations and the Lifeline and Link-Up universal service mechanism.³ In particular, the Bureau sought comment on a petition for reconsideration of a Commission order, filed by AT&T Corporation ("AT&T"), in which AT&T asked the Commission to modify its rules governing certification as an ETC to receive low income support from the USF, and on TracFone's amendments to its petitions for ETC designation in which TracFone limited its petitions to request only Lifeline (low income) support from the USF. TracFone filed reply comments in that proceeding on October 4, 2004.

In the above-referenced pleadings, TracFone has explained repeatedly why its ETC designation petitions are consistent with the applicable laws and regulations governing universal service and with the public interest. The commenters have raised issues concerning TracFone's ETC Petitions, most of which have been addressed in prior filings. However, in these reply comments, TracFone responds to the specific concerns contained in the comments to the ETC Petitions.

Comments on the ETC Petitions primarily focus on TracFone's Petition for Forbearance and contend that granting ETC status to pure resellers would not be in the public interest. In addition,

² TracFone's Petition for Forbearance applies to the concurrently filed petition seeking ETC designation in New York, as well as to all subsequently filed petitions seeking ETC designation in other states.

³ See Public Notice – The Wireline Competition Bureau Seeks Comment on Petitions Concerning Eligible Telecommunications Designations and the Lifeline and Link-Up Universal Service Support Mechanism, CC Docket No. 96-45 and WC Docket No. 03-109, DA 04-2750, released August 30, 2004.

commenters argue that TracFone should not be permitted to limit its ETC Petitions to request only low income support from the USF. The comments disregard the purpose of the Commission's authority to forbear from applying or enforcing provisions of the Act and the Commission's rules, as well as the policies underlying the universal service programs. Moreover, none of the comments alter the conclusion that TracFone meets the requirements for designation as an ETC and that grant of its request for forbearance is compelled by Section 10 of the Communications Act.

I. TracFone's Status as a Reseller Does Not Preclude the Commission from Granting Its Petitions for Designation as an ETC.

Section 214(e)(1)(A) of the Communications Act (47 U.S.C. § 214(e)(1)(A)) requires that a common carrier designated as an ETC shall offer services supported by the Federal Universal Service support mechanisms using either its own facilities or a combination of its own facilities and resale of another carrier's services. TracFone acknowledges that it does not meet this requirement, and therefore, has petitioned the Commission for forbearance requesting the Commission to forbear from applying the facilities-based service requirement to TracFone. Given the pending status of TracFone's petition for forbearance, arguments by FW&A,⁴ USTA, and Verizon, that a common carrier must provide services using its own facilities to be designated as an ETC lack merit and overlook the fact that Congress has specifically required the Commission to forbear from applying or enforcing the facilities-based requirement in appropriate circumstances.⁵ Contrary to USTA's assertion, TracFone is not simply arguing for a different interpretation of the Section 214(e)(1)(A) facilities-based service requirement.⁶ Rather, TracFone is requesting the Commission exercise the authority which Congress gave it in 1996 – *i.e.*, the authority to forbear from applying any provision of the Act or any regulation to a

⁴ FW&A describes itself as a consulting firm that serves rural Local Exchange Carriers in Kansas and Oklahoma. Nowhere in its comments does FW&A explain how grant of TracFone's ETC petitions for Massachusetts and Connecticut could have any impact on FW&A or on its consulting clients, all of whom are located in Kansas and Oklahoma.

⁵ See Comments of FW&A, at 4; Comments of USTA, at 2; Comments of Verizon, at 4.

⁶ See Comments of USTA, at 2.

telecommunications carrier upon a determination that the findings required by subsections (a)(1) through (3) of that section have been met. In its forbearance petition and in subsequent responsive pleadings, TracFone has supported that request by demonstrating that its forbearance petition satisfies each prong of the statutory standard for forbearance codified at Section 10 of the Act.⁷

USTA and Verizon improperly rely on the Commission's recent Order on Reconsideration in the Universal Service proceeding as a basis for denying TracFone's petition for forbearance.⁸ In the Order on Reconsideration, the Commission addressed a petition for reconsideration filed by Mobile Satellite Ventures Subsidiary LLC ("MSV") in 1997 concerning the Commission's earlier decision, also in 1997, that pure resellers should not be eligible to receive universal service support because they do not use their own facilities to provide service.⁹ In the 1997 USF Report and Order, the Commission considered whether to forbear from applying the facilities requirement of Section 214(e)(1)(A) to pure resellers, and determined that it would not be in the public interest to allow resellers to be designated ETCs on the basis that resellers would enjoy a double recovery if they were allowed to receive support from the USF as ETCs. The Commission explained that forbearance in the case of pure resellers would result in such resellers receiving a "double recovery" because the resellers would recover both the universal service support which was already incorporated into the wholesale price of the resold services and the support they would receive from the federal universal service support mechanisms as a result of their status as ETCs.

⁷ If all three prongs of the statutory standard for forbearance have been satisfied, exercise of its forbearance authority by the Commission is not discretionary, it is mandatory. See Cellular Telecommunications and Internet Association v. FCC, 330 F.3d 502, 509 (D.C. Cir. 2003) where the court held that if all three prongs of the Section 10(a) forbearance test are satisfied, "the Commission is obligated to forbear from enforcing a regulation or a statutory provision" (emphasis added).

⁸ See Comments of USTA, at 2-3 and Comments of Verizon, at 3-4 (citing Federal-State Joint Board on Universal Service, Order on Reconsideration, CC Docket No. 96-45, FCC 04-237 (rel. Nov. 29, 2004) ("Order on Reconsideration").

⁹ Order on Reconsideration, ¶ 9; see Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd 8776, ¶¶ 178-79 (1997) ("USF Report and Order").

In its 1997 petition for reconsideration, MSV argued that not all resellers obtain wholesale services from carriers that already receive universal service support. However, MSV did not specifically request that the Commission exercise its statutory forbearance authority set forth at Section 10 of the Act. Nor did MSV attempt to demonstrate that a request to forbear from the facilities-based service requirement of Section 214(e)(1)(A) met each of the standards for forbearance codified at Section 10(a)(1)-(3) of the Act.¹⁰ In denying MSV's petition for reconsideration, the Commission did not respond to the arguments raised by MSV, nor did it perform a forbearance analysis based upon the standards set forth at Section 10(a) of the Act..¹¹ Instead, the Commission stated that "pure resellers cannot receive support consistent with [the] statutory requirement [that the carriers use their own facilities to provide supported services]."¹² This conclusion describes Section 214(1)(A), but fails to consider whether the Commission should exercise its statutory authority to forbear from applying the facilities requirement to resellers seeking ETC status. So far as TracFone can determine, its forbearance petition constitutes the first request that the Commission forbear from application of Section 214(e)(1)(A) supported by a demonstration that each prong of Section 10(a)(1)-(3) has been met. Therefore, the Order on Reconsideration, does not constitute a Commission decision on whether it must forbear from applying the facilities-based service requirement to resellers seeking ETC status who do not rely on services from underlying ETCs, and who, like TracFone, have demonstrated that their forbearance requests satisfy each of the statutory forbearance criteria.

¹⁰ Had MSV made the requisite showing, the Commission would have been statutorily obligated to forbear from enforcement of Section 214(e)(1)(A). See n. 7, *supra*.

¹¹ The Commission shall grant a petition for forbearance if the following conditions are met: (1) enforcement of such regulation or provision of the Act is not necessary to ensure that "charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier . . . are just and reasonable and are not unjustly or unreasonably discriminatory;" (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such regulation or provision is consistent with the public interest. 47 U.S.C. § 160(a)(1)-(3). Section 160(b) further provides that forbearance is in the public interest if the Commission determines that forbearance from application of a statutory provision or a regulation promotes competition among providers of telecommunications services.

¹² Order on Reconsideration, ¶ 9.

Regarding the requirement that forbearance from applying such regulation or statutory provision must be consistent with the public interest, Verizon repeats its previous claim that “one key purpose of universal service support is to ensure that there is sufficient investment in infrastructure in high-cost areas so that consumers can receive access to quality telecommunications services at rates that are reasonably comparable to rates charged in urban areas.”¹³ Verizon is correct that ensuring sufficient investment in infrastructure in high cost areas is one purpose for universal service support. However, it is not the only purpose for universal service support. Availability of affordable service in all areas for low income Americans through the Lifeline program is another key purpose of universal service.¹⁴ Indeed, the very existence of the low income program, as well as the other universal service programs, demonstrates that infrastructure investment is only one of several goals of the universal service program.

FW&A also incorrectly asserts that universal service support is neither necessary nor required when an ETC is a pure reseller. First, FW&A claims that universal service support is based solely on facility costs, and therefore, a carrier must own facilities to receive universal service support.¹⁵ However, Section 214(e)(1)(A) specifically contemplates ETC status for companies who provide service, in part, by the resale of other carriers’ services. There is no minimum amount of facilities that a carrier must own to qualify for universal service support as a partial reseller. Carriers that provide much of their services by resale may qualify for and receive universal service support. Moreover, TracFone has stated repeatedly that it only seeks universal service support for its Lifeline program and that it would accept an ETC designation specifically conditioned on that limitation. The Lifeline program

¹³ Comments of Verizon, at 2.

¹⁴ See, e.g., Conference Agreement on the Telecommunications Act of 1996, H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 130 at 131 (“New Section 254(b) combines the principles found in both the Senate bill and House amendment, with the addition of ‘insular areas’ . . . and ‘low income consumers’ to the list of consumers to whom access to telecommunications and information services should be afforded.”) (emphasis added).

¹⁵ See Comments of FW&A, at 3-5.

“reimburses telephone companies for discounting consumers’ monthly bills.”¹⁶ So long as an ETC utilizes that support to discount the prices to its customers – as TracFone is committed to do, whether or not the ETC incurred higher infrastructure costs to provide the discounted service is irrelevant.

Second, FW&A alleges that if a carrier resells the services of a wireless carrier, it should pay no more for those services than the wholesale rate charged by a wireline local exchange carrier (“LEC”) that receives universal service support, and that a reseller paying any rate above the LEC rate is inefficient and should not receive universal service support. That argument is utter nonsense. Wireless resellers, like TracFone, purchase services from underlying wireless carriers, not from ILECs who are required by Section 251(c)(4) of the Act to offer service to resellers at government-mandated wholesale prices. The prices for wireless providers’ wholesale services are determined based upon market forces and have nothing to do with the wholesale prices for wireline services charged by incumbent local exchange carriers (ILECs) whose costs are supported by the Universal Service Fund. TracFone has negotiated agreements with wireless providers with service provided at nationally-uniform rates. In no instance has TracFone ever received special pricing from an underlying carrier in a state where an underlying carrier receives universal service support. In this regard, FW&A’s statement that competitive carriers should not “receive support for lines served through resale of another carrier’s universal service offering” is meaningless.¹⁷ TracFone does not resell any carrier’s “universal service offering.”

FW&A’s attempt to intermix USF-supported ILEC wholesale services (provided pursuant to Section 251(c)(4) of the Act) with wholesale wireless services purchased in the unregulated wireless marketplace disregards the fundamental differences between ILEC wireline service and wireless service. Wireline and wireless services priced differently and offer consumers different features and different

¹⁶ Universal Service Administrative Company, Low Income Components, Lifeline, *available at* www.universalservice.org/li/components/lifeline.asp.

¹⁷ FW&A Comments at 5.

benefits. As such, the wholesale rate charged by a wireline ILEC has no relevance to the forbearance showing set forth in TracFone's forbearance petition.

II. TracFone's Decision to Restrict the Scope of its ETC Petitions to the Lifeline Program is Consistent with the Laws and Regulations Governing Universal Service and with the Public Interest.

The limited scope of TracFone's ETC petitions is fully consistent with the laws regarding universal service. By stating that it will not seek high cost support if designated as an ETC, TracFone is not attempting to avoid any of the legal requirements applicable to ETCs. TracFone's ETC Petitions demonstrate that it will meet all requirements to be designated as an ETC (except for the "facilities-based requirement of Section 214(e) for which it has petitioned for forbearance). TracFone does not contend that any ETC designation requirements are not applicable to TracFone because it does not intend to seek high cost support.

Contrary to claims by USTA and Verizon, there is no requirement that an ETC provide services supported by the low-income and high-cost universal service programs.¹⁸ Carriers designated as ETCs are eligible to receive universal service support distributed under the low income and high cost support mechanisms.¹⁹ The Commission's rules provide that all ETCs "shall: (a) make available Lifeline service . . . to all qualifying low-income customers."²⁰ In addition, Section 54.101 of the Commission's rules lists services and functionalities that "shall be supported by federal universal service support mechanisms" and that must be offered by ETCs to receive universal service support. However, the Commission's rules do not require that carriers providing such services and functionalities seek high cost support. Nor do the rules require that carriers designated as ETCs utilize universal service funding to provide both low income and high cost supported service. Thus, while an ETC may provide the

¹⁸ See Comments of USTA, at 4; Comments of Verizon, at 4-5.

¹⁹ See 47 U.S.C. § 214(e)(1) ("[a] common carrier designated as an eligible telecommunications carrier . . . shall be eligible to receive universal service support); 47 C.F.R. § 54.201(a) (ETCs "shall receive universal service support distributed pursuant to . . . Subparts D [high cost] and E [low income] of this part.")

²⁰ 47 C.F.R. § 54.405(a).

services listed in Section 54.101 to consumers in high cost areas, the ETC is not required to seek federal support for the provision of such services. If designated an ETC, TracFone, may determine that it is able to provide the services required of an ETC without needing high cost support from the USF. Moreover, the Commission has the authority and has exercised the authority to designate a carrier as an ETC subject to specified conditions.²¹ Therefore, TracFone's willingness to accept a restriction on its ability to seek high cost support as a condition of the Commission's grant of ETC status is lawful and appropriate.

Finally, by limiting its use of universal service support to provide a needed Lifeline service, TracFone will minimize the amount of support which it will receive from the USF which will thereby limit growth of the fund. Given TracFone's commitment not to seek support under the high-cost program, Verizon's contention that the portability of high cost support should be limited to restrict the growth of the size of the USF is not a reason for the Commission not to grant TracFone's ETC Petitions.²²

CONCLUSION

For all of the reasons set forth in these reply comments as well as in TracFone's petitions for designation as an ETC in Connecticut and Massachusetts and its petition for forbearance, TracFone has demonstrated that its ETC proposal to offer Lifeline service would serve the public interest, would comply with each of the public interest criteria established by the Commission for consideration of ETC petitions, and that it has met each prong of the standard for forbearance from application or enforcement of Section 214(e)(1)(A)'s facilities-based requirement, as set forth at Section 10 of the Act. More

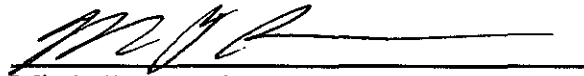
²¹ 47 U.S.C. § 154(i); see e.g., Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, 19 FCC Rcd 1563 (2004) (ETC designation subject to conditions described in order). If the Commission designates TracFone as an ETC subject to a condition that it may utilize universal service funds solely to provide Lifeline service to qualifying low income consumers, TracFone may not simply "change its position", as suggested by USTA, disregard that express conditions, and seek disbursements from the USF under the high-cost program. See Comments of USTA, at 4.

²² See Comments of Verizon, at 4.

importantly, TracFone will, if designated an ETC, actively promote the availability of the significantly underutilized Lifeline service in Massachusetts and Connecticut, and will thereby increase utilization of the important but underutilized Lifeline program.²³ Accordingly, TracFone respectfully urges the Commission to exercise its statutory authority to forbear from application of Section 214(e)(1)(A) of the Act, and to promptly grant its petitions for designation as an ETC in Connecticut and Massachusetts so that TracFone may offer its Lifeline program to eligible Connecticut and Massachusetts low income consumers.

Respectfully submitted,

TRACFONE WIRELESS, INC.



Mitchell F. Brecher
Debra McGuire Mercer

GREENBERG TRAURIG, LLP
800 Connecticut Avenue, NW
Suite 500
Washington, DC 20006
(202) 331-3100

Its Counsel

December 29, 2004

²³ As TracFone noted in its ETC petitions, according to Commission data, the Lifeline participation rate among eligible consumers in Connecticut is only 30.7 percent; in Massachusetts it is 38.8 percent. In the Matter of Lifeline and Link-Up (Report and Order and Further Notice of Proposed Rulemaking), FCC 04-87, released April 29, 2004.

CERTIFICATE OF SERVICE

I, Michelle D. Diedrick, an Executive Assistant with the law firm of Greenberg Traurig, LLP, hereby certify that on December 29, 2004, a copy of the foregoing Reply Comments of TracFone Wireless, Inc. was filed with the following:

COPY of the foregoing served via electronic mail to the **FCC's Electronic Comment File Submission** on this 29th day of December, 2004

Marlene H. Dortch
Secretary
Federal Communications Commission
c/o Natek, Inc.
236 Massachusetts Avenue, NE
Suite 110
Washington, DC 20002

Thomas Buckley
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Anita Cheng
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Sheryl Todd
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Jeffrey Carlisle, Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

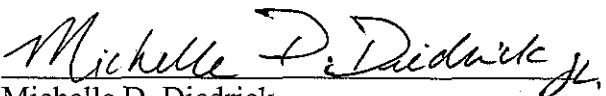
John Muleta, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

COPY of the foregoing served via **U. S.**
Postal Mail this 29th day of December, 2004 to:

Paul W. Cooper
Fred Williamson & Associates, Inc.
2921 East 91st Street
Suite 200
Tulsa, OK 74137-1618

James W. Olson
Indra Sehdev Chalk
Michael T. McMenamin
Robin E. Tuttle
United States Telecom Association
1401 H Street, NW
Suite 600
Washington, DC 20005

Edward Shakin
Ann H. Rakestraw
Verizon
1515 North Court House Road
Suite 500
Arlington, VA 22201


Michelle D. Diedrick